In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 713

FORSTER MFG. CO., INC. AND THEODORE R. HODGKINS, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

1. Forster Mfg. Co., Inc., is a Maine corporation which is the "dominant manufacturer and nationwide seller" of about 25 different "woodenware products" (App. 3–4) [1] and Theodore R. Hodgkins is its president, principal stockholder, and general policy maker (App. 3; Pet. App. 16). The amended complaint of the Federal Trade Commission (App. 3–8, 15) alleged that petitioners had discriminated in price in connection with the sale of certain woodenware products, including meat skewers, clothespins, and ice cream

[1] "App." refers to the appendix filed by petitioners in the court below and "Pet. App." to the appendix to the petition for a writ of certiorari.

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spoons, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) (App. 3–6, 15).

After full administrative proceedings, the Commission issued its opinion and order (App. 391–441, 450–451) in which it found that beginning in approximately 1956 petitioners embarked upon a course of predatory pricing in connection with the sale of meat skewers, the specific purpose of which was to drive from the market its principal competitor in that line of commerce, the Farmington Dowel Products Company (App. 395–405). Pursuant to that plan, petitioners over a short period of time slashed their list price across the board on the most popular size of meat skewer from $9.50 per case to the below-cost figure of $6.90 (App. 400). During the period of this general price reduction, petitioners extended substantial discriminatory discounts from this below-cost list price to at least two purchasers (App. 402–403). Later, when the list price had been partially restored to $8.20 per case, petitioners continued the discriminatory discounts to the two favored customers and permitted one additional large customer, Armour & Company, to continue purchasing skewers at the below-cost figure of $6.90 per case (App. 401–403). As a result of substantial diversions of sales, Farmington ceased production in February 1958 and thereafter petitioners restored their list price to $9.00 (App. 406). The Commission held that while the general across-the-board price cuts were one of the causes of Farmington's inability to remain in business, the discriminatory allowances to three substantial purchas-

ers "were a contributing cause" (App. 405). The Commission also concluded that these discriminatory prices resulted in substantial diversions of sales to petitioners from other, smaller competitors (App. 405–406).

Similarly, the Commission found that during the same period petitioners had discriminated in price in the sale of ice cream spoons to purchasers in certain areas of the southeast (App. 406–410) and that they sold a substantial quantity of clothespins in the Pittsburgh, Pennsylvania, area at a price lower than that available in other areas (App. 414–416). It concluded that the price discriminations in the sale of ice cream spoons had resulted in substantial diversions of sales to petitioners from their competitors (App. 406–410) and that the price differentials in connection with the sale of clothespins had prevented a small competitor from entering the Pittsburgh market (App. 414–416). The Commission concluded that since it was clearly established that the individual petitioner, who was the moving force behind the corporate petitioner, had conceived and successfully executed a predatory plan to drive his major competitor out of one line of commerce, "[w]e think [he] pursued his pricing policies in regard to his other products with the same predatory intent that led him to destroy Farmington, his competitor in the skewer field" (App. 407).

On the basis of these findings, the Commission concluded that petitioners' predatory price discriminations (1) were an important factor in the substantial lessening of competition between petitioners and their

competitors in the production and sale of meat skewers and in a tendency toward a monopoly on the part of petitioners in that line (App. 406); (2) were likely to result in injury to competition between petitioners and their competitors in the ice cream spoon line (App. 414); and (3) were largely responsible in preventing a new competitor from breaking into the clothespin market in Pittsburgh (App. 416).

Finally, the Commission rejected petitioners' contention that price discriminations in meat skewers and clothespins had been made in good faith to meet the equally low price of a competitor and therefore were justified under the provisions of Section 2(b) of the Act (15 U.S.C. 13(b)). The Commission held, in effect, that before that defense could be available, the discriminator must show that he had determined in advance of his price cut not only the identity of of his competitor whose price he purportedly was meeting but the exact amount of the competitor's lower price as well (App. 430).

On petition for review of the Commission's cease and desist order, the court of appeals affirmed the findings of the Commission that petitioners had, with predatory design, discriminated in price in each of the three product lines involved and that such discriminations violated Section 2(a) of the Clayton Act. It ruled, however, that the Commission had misinterpreted the defense embodied in Section 2(b) of the Act as to good faith meeting of competition by requiring the discriminator to ascertain in advance of his price cut the precise identity of his competitor and the exact amount of the lower price he was charging

(Pet. App. 29–30). The court held that this standard was more strict than the rule laid down by this Court in *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746, 759–760, that a discriminator need show merely "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor" (App. 29–30). The court therefore remanded to the Commission for consideration of petitioners' defense in the light of that standard. It also concluded that, while the Commission's order "might well be clarified and perhaps somewhat modified, * * * since the case must go back to the Commission, we shall not undertake to do so ourselves" (Pet. App. 31). Final judgment was entered setting aside the order of the Commission and remanding the case for further proceedings.

2. The petition should be denied because, at this stage of the proceedings, resolution of the questions presented would be premature. The questions all relate to the Commission's findings that petitioners violated Section 2(a). Those issues may become moot, however, if the Commission on remand sustains petitioners' defense under Section 2(b) of meeting competition. Thus, the appropriate time for reviewing the questions here raised, if at all, would be in connection with review of any cease and desist order the Commission may enter in the remanded proceedings.

The defense was specifically raised as to clothespins and, if found valid, would clearly nullify a finding of violation on sales of this product. As to meat skewers, while the defense was raised only as to the sales

to Armour (App. 417–421), those sales were one of the principal bases of the Commission's determination on this line of commerce (App. 392, 402–403). Similarly, although the defense was not specifically made as to ice cream spoons (App. 417),[2] if it were sustained for the other two lines of commerce, it would probably upset the Commission's finding of unlawful discrimination in the third line as well. This is so because (1) the Commission concluded that Section 2(a) requires a finding that "the discriminations in question may have the *effect* of substantially lessening competition" (emphasis in original) (App. 397); (2) it found that petitioners' predatory intent, while "not a necessary element in a price discrimination case," was "certainly relevant" in the present proceeding "in determining whether or not" this effect occurred (App. 397); (3) in finding predatory intent concerning ice cream spoons, it relied heavily on the predatory intent which had been shown to underlie petitioners' price discriminations concerning meat skewers, since it could be inferred that a similar intent underlay petitioners' price discriminations concerning ice cream spoons[3] (App. 407); and (4) if the

[2] Petitioners, however, did contend (see Initial Decision, App. 352; see also Opinion of the Commission, App. 409–413) that a price war was being waged with respect to ice cream spoons and that this showed that petitioners' activities in this line of commerce did not injure competition.

[3] In finding predatory intent in the ice cream spoon line, the Commission also relied upon testimony of one of petitioners' former salesmen reporting a statement of petitioner Hodgkins that, if he did not get the business of a particular customer at the price he was prepared to offer, "*the company that did get it wouldn't make any profit on it*" (emphasis in the original) (App. 408).

Commission found that the price discrimination concerning meat skewers was made in good faith to meet the equally low price of a competitor, this would eliminate the skewer violation and the predatory intent with relation to it. Thus, if the Commission were to accept petitioners' Section 2(b) defense concerning meat skewers, this might also undermine the Commission's determination that petitioners' price discrimination concerning ice cream spoons had substantially lessened competition. Furthermore, if in applying the standards laid down by the court of appeals the Commission should accept the defense as to one or two lines of commerce, this may induce it to re-examine the entire proceeding to determine whether the public interest required the imposition of an order which the court of appeals deemed "broad indeed" (Pet. App. 30–31) as to the remaining unjustified discriminations.

Finally, even if the Commission, applying the test directed by the court of appeals, rejected the good faith meeting of competition defense and on reconsideration entirely reaffirms its first opinion and order, petitioners would be free to raise these issues on appeal from this new determination. In the event the Commission's order were subsequently upheld by the court of appeals, petitioners could raise all of the issues presented in the present petition, as well as any new ones emerging from the Commission's action on remand, in their petition for a writ of certiorari. See, *e.g.*, *United States* v. *United States Smelting Co.*, 339 U.S. 186, 198; *Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 408–409; *Hamilton-Brown Shoe Co.* v.

Wolf Brothers & Co., 240 U.S. 251, 257–258; *Toledo Scale Company* v. *Computing Scale Company*, 261 U.S. 399, 418.

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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